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Issue date: 22May2001

In the Matter of	:	
	:	
PAUL BRUCE	:	
Claimant	:	
	:	Case No.: 1992-LHC-01052
v.	:	OWCP No.: 4-30368
	:	
ITO CORPORATION OF BALTIMORE	:	
Employer	:	

Myles R. Eisenstein, Esq.
Baltimore, MD
For the Claimant

Michael Prokopik, Esq.
Baltimore, MD
For the Respondent

Before: JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER ON REMAND[1]

This is a claim for compensation for permanent partial disability arising under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq*. (hereinafter "the Act"). A formal hearing was held in Baltimore, Maryland, on May 17, 2000. Previous to this date, hearings were held in this matter on June 4, 1992 and January 15, 1998. The 1992 hearing was before Judge Williams. At that time, the parties stipulated to jurisdiction, that Claimant's average weekly wage was $796.64, and that Claimant was temporarily totally disabled from April 20, 1990 through July 8, 1990 and from

[1] The following abbreviations will be used when citing to the record in this case: EX–Employer's Exhibit; CX–Claimant's Exhibit; TR–May 17, 2000 Hearing Transcript; 1998 TR–January 15, 1998 Hearing Transcript; 1992 TR–June 4, 1992 Hearing Transcript.

September 4, 1990 through January 9, 1991. Judge Williams issued a decision awarding benefits for permanent partial disability for a leg injury under §8(c)(2).

On appeal, the Benefits Review Board found that the injury should be treated as an injury to the foot under §8(c)(4) rather than an injury to the leg under §8(c)(2). The case was then remanded with an order to determine the extent of disability under §8(c)(4). Judge Williams had by this time retired, and the case was reassigned to Judge Rosenzweig. Judge Rosenzweig granted Claimant's request that another hearing be held to determine the credibility of the Claimant. The hearing was scheduled but subsequently was continued due to the unavailability of Judge Rosenzweig, and the case was reassigned to me. In light of the Board's unusual and specific instruction that the case on remand be decided "based on the medical evidence *of record*" (Benefits Review Board's Decision and Order, slip op. at 3 (emphasis added)), I denied a request by Claimant to reopen the record for new medical evidence. A hearing was then held before me on January 15, 1998. At the hearing, only Claimant testified, and the parties resubmitted the same exhibits as were already in the record. Following the submission of post-hearing briefs, the record was closed. On September 18, 1998, I issued my decision finding that Claimant had a 2% permanent partial disability to the right foot. Claimant appealed this decision to the Board based on my denial of his request to submit additional medical evidence. The Board, holding that I misconstrued its remand order, vacated my decision and remanded the case for the admission of further evidence. Accordingly, a third hearing was held, on May 17, 2000. At this hearing Claimant submitted the deposition, curriculum vitae and medical report of Dr. William Russell, which were admitted as Claimant's Exhibit 7. Employer submitted the curriculum vitae of Dr. Thomas Edward Hunt; the March 6, 2000 report of Dr. Hunt; the May 29, 1992 report of Dr. Hunt; the October 22, 1991 report of Dr. Hunt; and a December 1997 deposition of Claimant. These exhibits were admitted as Employer's Exhibits 10, 11(a), 11(b), 11(c), and 12, respectively. Only Claimant and Dr. Hunt testified at the May 2000 hearing. At the conclusion of the hearing, the record was closed except for the filing of post-hearing briefs. The parties submitted their briefs at the end of July, 2000.

Claimant contends that he is entitled to compensation for a 38% impairment of the lower extremity. Employer argues that Claimant is only entitled to compensation for a 2% impairment to his right foot.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

Claimant is 66 years old and has worked as a longshoreman for 30 years (TR 9). He worked at a lasher for most of this time, although he was working primarily as a gang carrier at the time of the May 2000 hearing (TR 9, 21). Claimant now carries an A One card, although he had an F card at the time of his injury (TR 34).

On April 19, 1990, while working for Employer, Claimant was injured when his right foot became trapped between two containers (TR 13). Following the accident, Claimant received emergency treatment at Mercy Hospital (1998 TR 32). Dr. Franks, a plastic, hand and reconstructive surgeon, commenced treatment of Claimant on May 1, 1990 (EX 2). Claimant then came under the care of Dr. Naiman, an orthopedic surgeon, who eventually diagnosed Claimant with traumatic right tarsal tunnel syndrome (EX 3). Under Dr. Naiman's care, Claimant eventually underwent surgery on September 4, 1990 for a right tarsal tunnel release. During the surgery, Dr. Naiman noted that there was marked scar formation involving the tibial nerve and removed the scar from the posterior, deep aspect of the tibial nerve (CX 3A). In his follow-up notes, Dr. Naiman noted that Claimant was continuing to complain of pain, but that he was making slow and steady progress and that his foot and ankle were quite functional (EX 3). In a December 31, 1990 note, Dr. Naiman stated that he believed it reasonable for Claimant to resume "the regular duties of his occupation on or about January 3, 1991" (*id*.). However, Dr. Naiman's report of Claimant's final visit, on May 10, 1991, stated that "Mr. Bruce has not reached maximum medical improvement" and it was not "appropriate to rate this gentleman" (*id*.).

On February 26, 1991, Dr. Honick, also an orthopedic surgeon, evaluated Claimant. Claimant reported to Dr. Honick that he felt the surgery did not help him very much, although he stated otherwise to other doctors[2] (CX 2; CX 7; EX 3). Dr. Honick diagnosed Claimant as having tarsal tunnel syndrome. He made no recommendations with regard to treatment, but did assess Claimant as having a 39% disability rating of the right lower extremity. Dr. Honick arrived at this rating by adding 4% loss of right ankle motion, 15% pain, and 20% loss of function. Dr. Honick stated that he based this rating on the "AMA Guides" (CX 2), by which it is presumed he was referring to the *Guides to the Evaluation of Permanent Impairment* published by the American Medical Association. He attached several tables, presumably from that publication, to his report.[3]

On June 17, 1991, the Claimant was evaluated by Dr. Kan, another orthopedic surgeon, at the request of the District Director. He noted that Claimant had an essentially normal gait, essentially

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[2] Claimant reported to Dr. Russell that he had some help from the surgery (TR 30; CX 6, at 26; CX 7). Dr. Naiman also noted after the surgery that Claimant was "not complaining of the severe pain he was complaining of before" (EX 3).

[3] At the time that his report and several others in the record were written, the third edition fo the *AMA Guides* was the current edition, as the fourth edition was published in June 1993. The tables attached to Dr. Honick's report are not contained in the third edition, nor are they contained in the second edition. Accordingly, it is likely that they were pulled from the first edition. Nevertheless, they appear to be identical in content to similar tables in the third edition.

normal muscle strength of the toe, flexors, and extensors, and normal limits of the foot dorsiflexors and plantar flexors, though perhaps slightly decreased (EX 7). Claimant had a positive Tinel's sign in the middle of the surgical incision, and Dr. Kan noted minimal

degenerative changes in an x-ray of the right ankle. Finally, the doctor estimated that Claimant sustained a 15% permanent impairment of the right foot and ankle.

Claimant was also examined by Dr. Hunt, another orthopedic surgeon, on October 14, 1991, May 28, 1992, and February 29, 2000. Dr. Hunt also reviewed the records of all the other doctors who had treated Claimant for his foot injury. Upon the first examination, Dr. Hunt noted that Claimant complained of pain and paresthesias along the course of the medial and lateral plantar nerve branches of the right posterior tibial nerve, but also noted there was no neuroma and that the nerve and its branches were in continuity. Dr. Hunt also stated that Claimant was experiencing no loss of motor control in his ankle, foot, and toes, and that he retained propioception and sensation and there were no trophic skin changes. He also stated, consistent with the opinion of Dr. Naiman, that a final assessment of Claimant's condition should not be made only 13 months after Claimant's surgery, but should be made two years or more from the surgery. After a May 29, 1992 examination, Dr. Hunt determined that Claimant's maximum percent loss of function due to sensory deficit under the *AMA Guides* would be 5%. However, because he felt Claimant was functioning so well, he estimated Claimant as having no more than a 2% disability of the foot, based solely on Claimant's subjective complaints of pain (EX 8).[4] Dr. Hunt examined Claimant a final time on February 29, 2000 (EX 11(a)). In his report, Dr. Hunt stated that Claimant's function of his motor nerves and muscles controlling the lower extremities was intact, and that he retained the tone and bulk in his thigh and leg muscles. He noted that Claimant's injury was almost ten years old at the time of his examination, and that Claimant had no definite loss of function of the motor component of the nerve, but that Claimant continued to complain of pain in his right foot and lack of feeling in his right great and second toes (EX 11(a)). He again stated that, based solely on subjective complaints, Claimant had "no more than 2% impairment of his right foot" (EX 11(a)).

In Dr. Hunt's 1992 deposition, he further explained how he reached his disability rating. He stated that, although some nerve conduction studies showed slowed nerve response, similar results were obtained from Claimant's uninjured side and the uninvolved peroneal nerve. Therefore, he stated,

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[4] At his 1992 deposition, Dr. Hunt explained why he gave Claimant an impairment rating in May 1992 even though two years had not yet passed since Claimant's surgery. He stated that an impairment rating was needed for purposes of the hearing, and that it was appropriate to give a rating because there was no indication that Claimant's condition would worsen; rather, Claimant's impairment rating could only improve by a later date (CX 6, at 22-24).

Claimant's abnormal response was most likely not caused by the accident, but rather by some neurological or metabolic disease (EX 9, at 31-34). Dr. Hunt explained an alternative cause to Claimant's pain at the May 2000 hearing. He noted that Claimant had a coronary artery bypass due to calcification of vessels in his heart, and that x-rays taken by Dr. Honick revealed that Claimant had some calcification of the tibial vessels as well (TR 92). The calcification of the tibial vessels could lead to the clottication, a condition that can cause

numbness and tingling in the foot due to diminished circulation (TR 91-93).

Finally, Claimant was examined by Dr. Russell on October 21, 1997 (CX 7). Dr. Russell's report stated that Claimant had a positive Tinel's sign on percussion over the surgical scar and limitation of plantar flexion, dorsiflexion, inversion and eversion of the ankle. However, Claimant showed no atrophy of the calf muscle or evidence of swelling in the foot or ankle. He reported that Claimant walked with a slight limp. He assessed Claimant as having a 38% impairment of the lower extremity, which he calculated by adding an 18% impairment due to range of motion limitations and a 20% impairment for "an entrapment neuropathy due to compression of the tibial nerve in the tarsal tunnel" (CX 7). He stated that he used the *AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition*, in preparing his report. However, in his April 21, 2000 deposition, Dr. Russell did not seem to recall exactly how he calculated Claimant's impairment rating, and indicated that he did not necessarily follow the *AMA Guides* in calculating the impairment rating (CX 7, at 53-55).

Drs. Russell and Hunt's opinions comprise the only new medical evidence in the record, so their findings warrant further discussion. Both doctors noted that Claimant had no loss of muscle tone in the leg or foot and no trophic skin changes (CX 7, at 60-61; TR 77-79). In addition, neither doctor found it necessary to take further x-rays of Claimant's foot (CX 7, at 66; EX 9, at 55-56). Beyond these similarities, however, the two doctors disagreed significantly regarding the cause of Claimant's pain and the extent of his injury. Dr. Russell stated that both the posterior tibial nerve and the medial calcaneal nerve were involved (CX 7), while Dr. Hunt stated that the medial calcaneal nerve was not involved in Claimant's injury (TR 82-84). Further, Dr. Hunt pointed out that according to Dr. Naiman's surgery report, scar tissue was only found around the posterior tibial nerve, not on the nerve itself, and stated that when he felt the scar it was not adherent to the underlying tissue (TR 84, 97-98). Dr. Russell admitted that he did not know whether the scar was adherent to the nerve or not (CX 7, at 70), and so presumably did not consider this fact in his evaluation and rating (CX 7, at 70-71). Dr. Russell stated that Claimant had a loss of plantar flexion, dorsiflexion, inversion, and eversion (CX 7, at 50-51), whereas Dr. Hunt found no such limitations (TR 78-79). Dr. Russell stated that Claimant walked with a slight limp, but Dr. Hunt observed no limp or unusual callousing of Claimant's foot to indicate that he walked with a limp. Dr. Russell elicited a positive Tinel's sign upon tapping the scar area (CX 7, at 32); Dr. Hunt did not perform the test, saying it was not necessary because the nerve

was not severed (TR 129).

The doctors also had disparate readings of Claimant's electromyography ("EMG") and nerve conduction test. Discussing the nerve conduction test, Dr. Hunt explained that Claimant's distal latency was below the normal range on both the left and right foot and in both the posterior tibial nerve and peroneal nerve, which was not involved in his April 1990 accident (EX 9, at 12-14). He stated that "since there seems to be something in both legs, and in both nerves in both legs . . . it makes it difficult to explain this on the basis of [the April 1990] injury" (EX 9, at 34). He stated that Claimant's test results were within the normal range according to Dr. Weisman.

When questioned, Dr. Hunt stated that he had taken courses in the test, but that he "would not attempt" to perform an EMG himself (EX 9, at 56). Dr. Russell testified that, on the EMG, Claimant had slightly decreased responses in the left muscles as compared to the right foot, but prefaced his comments by saying that he was "not an expert at interpreting these reports" (CX 7, at 17) and later added that "[i]ts a little difficult for me to interpret this" (EX 7, at 19).

At the hearing in May 2000, Claimant complained of numbness in his toes and burning in the bottom of his foot (TR 24). Initially, he did not mention that he walked with a limp, but on cross examination stated that he limped about 50% of the time (TR 33). At the 1998 hearing, he stated that he walked with a limp about 90% of the time (1998 TR, at 69). Claimant also stated at the 2000 hearing that he was unable to climb ladders, but could climb flat steps (TR 24-25). He stated that he was unable to do work that required climbing (TR 57). He testified similarly at his hearing in January 1998, saying that he lacked the strength in his ankle to climb ladders (1998 TR, at 42). However, Claimant also testified that, after his injury, he worked as a leader in the hold of the ships, and stated that he had to climb ladders to get to the hold (EX 12, at 14-15; 1998 TR, at 43). Claimant also has part ownership in a tree pruning and cutting business called Bob Webster's Tree Company, and testified inconsistently regarding whether he ever climbed trees as part of this business (TR 42-43). He stated that "I do no climbing," (TR 42), but also stated that his partner "does *most* of the climbing" (emphasis added) (TR 46). Claimant did not notify Dr. Russell about his tree pruning business (TR 31; CX 7, at 41). Claimant also testified on cross examination that he has not gone to a doctor for treatment of his foot in 9 years, although his foot has been examined several times for the purposes of litigation (TR 29).

B. Discussion

The only new evidence in this case consists of Dr. Russell's medical records and deposition (CX 7); Dr. Hunt's hearing testimony, curriculum vitae, and reports; and Claimant's May 2000 hearing testimony. The Board remanded this case to allow the submission of further evidence, but did not note any error in my evaluation of the evidence already in the record. I have reviewed all of the evidence in

the record, and the additional evidence has not altered my evaluations of Drs. Honick, Kan, and Naiman's opinions. Drs. Hunt and Russell's evaluations require more extensive discussion.

As stated in my previous decision, Drs. Honick and Kan do not adequately explain how they arrived at their ratings, and their opinions are entitled to little weight. Neither of these physicians explained the connection between Claimant's subjective complaints of pain, his motor functions, and the disability rating. Furthermore, Dr. Naiman, who I found very credible and who was Claimant's treating physician, stated on May 10, 1991 that Claimant should not be rated at the time because his condition was still improving. Dr. Naiman stated that Claimant would not reach maximum medical improvement for another year or two, and any evaluation made at that time, *i.e.* May 10, 1991, would be meaningless. The fact that Dr. Honick's disability impairment rating was made less than six months after the surgery underscores its lack of probative value. Dr. Kan's rating, which was made only a month after Dr. Naiman indicated Claimant was still a year or two away from maximum medical improvement, likewise was premature and has no probative value.

Drs. Russell and Hunt examined Claimant well after the time that Dr. Naiman indicated that Claimant could be rated, and their evaluations are of the most significance on this remand. Dr. Russell opined that Claimant had "entrapment neuropathy of the ankle and foot secondary to trauma, with involvement of the posterior tibial nerve and medial calcaneal nerve" and gave Claimant a 38% impairment rating of his right lower extremity (CX 7), whereas Dr. Hunt gave Claimant a 2% impairment rating of the right foot based on subjective complaints of pain alone.

I give little weight to Dr. Russell's impairment rating. While neither doctor was able to perform and interpret an EMG and nerve conduction test, Dr. Russell seemed unable to even discuss the meaning of the performing doctor's interpretation and results. Dr. Russell also never reviewed Dr. Naiman's operative report, and did not know that only Claimant's tibial nerve was encased in scar tissue, but that the nerves themselves were intact (EX 7, at 46). He also did not recall whether Claimant's scar was adherent to the underlying tissue, which, according to Dr. Hunt, would effect nerve involvement (CX 7, at 70). Dr. Russell was not familiar with the extent of Claimant's physical abilities, as he was unaware of the specifics of Claimant's longshore work and did not know of Claimant's tree pruning business (CX 7, at 41-42). Further, there is no indication in his report that Dr. Russell compared Claimant's left foot with his right foot to see whether his responses were similar in both feet (CX 7, at Deposition Exhibit 2). This is particularly harmful to his testimony that Claimant had a positive Tinel's sign. While a positive Tinel's sign indicates abnormal nerve function, the test loses probative value when the doctor fails to compare results in the uninjured foot to see if the nerve in that foot also functions abnormally.

Most importantly, Dr. Russell was unable to articulately explain how he arrived at his impairment rating, and how he utilized the *AMA Guides*. In his deposition, he first indicated that he did not necessarily follow the *AMA Guides* (CX 7, at 54-55). He later stated that he used the *AMA*

Guides for upper extremities when calculating his impairment rating, because there was "no specific section that refers to an entrapment syndrome for the lower extremity" (CX 7, at 58). However, Employer argues that Chapter 3, Table 68 of the Fourth Edition sets forth percentages for impairment of lower leg nerve deficits. While this table does not appear to precisely address Claimant's injury as diagnosed by Dr. Russell, it provides some guidance for calculating Claimant's impairment. Dr. Russell's finding of 18% impairment for range of motion appears excessive, considering that the *AMA Guides* provide significantly lower numbers, that Dr. Russell was unable to remember how many times he tested ranges of motion and what Claimant's range of motion was in his left foot,[5] and that Dr. Hunt found no limitation in range of motion. In addition, while his report states that the 20% value was due to compression of the tibial nerve in the tarsal tunnel, Dr. Russell stated in his deposition that this 20% rating also
included "provision for the factors of pain, discomfort, weakness, loss of endurance, functional impairment and muscular atrophy" (CX 7, at 61-62). However, neither Dr. Russell nor Dr. Hunt noticed any muscular atrophy, and the evidence of weakness, loss of endurance, and functional impairment is tenuous at best.

Finally, Dr. Russell's impairment rating is simply incongruous with the facts of this case. As Employer points out, Claimant has not sought treatment in over nine years, despite his complaints of significant pain. Further, Claimant has apparently remained very active since his injury, working full time as a longshoreman in addition to working at his tree pruning business. Claimant's behavior is simply not consistent with that of a man who has suffered a 38% impairment to his lower extremity.

In my previous decision, I afforded the most weight to Dr. Hunt's opinion. The further evidence submitted and the opportunity to evaluate his live testimony reaffirms my prior assessment. Unlike Dr. Russell, Dr. Hunt reviewed all relevant medical records and reports of the other doctors treating and examining Claimant. He saw Claimant three times over a period of nine years, which afforded him the opportunity to become familiar with Claimant's medical condition and progression. He also offered an alternative reason for Claimant's symptoms that would explain why Claimant's nerve conduction test results yielded slightly reduced levels on both feet and on unaffected nerves. In sum, Dr. Hunt's reasoning was by far the best explained, both in his reports and in his deposition and hearing testimony. As mentioned in my earlier decision, Dr. Hunt's finding of a 2% impairment of the foot is not inconsistent with the *AMA Guides*. Although the *AMA Guides* permit a maximum impairment rating of 5% due to "sensory deficit, pain or discomfort in the distribution of the medial plantar nerve of the tibial nerve"[6] (EX 8, report of May 29, 1992, at 2), it is not inconsistent with the *AMA Guides* for Dr. Hunt

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[5] Dr. Russell stated that he probably conducted the range of motion tests more than once, but only listed one range of motion in the report (CX 7, at 36). He also made no mention of the left foot in his report and had no memory regarding the ranges of motion in that foot (EX 7, at 46).

[6] See *AMA Guides*, Third Edition, Page 77, Table 51.

to find a lower degree of impairment. Moreover, only under §8(c)(13), which governs determinations of hearing loss, are the *AMA Guides* binding. Therefore, Dr. Hunt's opinion and impairment rating are the best explained and most credible in this case.

I find that the medical evidence and Claimant's activity level support a finding of only a 2% impairment to the right foot. Accordingly, based on all the evidence in the record, I find Claimant to have a 2% permanent partial disability of the right foot under §8(c)(4) of the Act.

ORDER

IT IS ORDERED that Employer shall pay to Claimant compensation for a 2% impairment to the right foot in accordance with §8(c)(4) of the Act, commencing on May 29, 1992, based on an average weekly wage of $796.64. Interest shall be paid on all unpaid compensation from the date due until paid in accordance with 28 U.S.C. §1961(a) (1994).

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JEFFREY TURECK
Administrative Law Judge